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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 879

F. P. BAUGH, INC., a California corporation,
Petitioner,

vs.

LITTLE LAKE LUMBER COMPANY, a.k.a. LITTLE LAKE LUMBER CO., a partnership; UNITED STATES OF AMERICA, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable, the Chief Justice and Associate Justices, of the Supreme Court of the United States:

The Petitioner, F. P. BAUGH, INC., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this cause.

OPINIONS BELOW

The opinion of the District Court is reported in 185 F. Supp. 628 (N.D. Cal., S.D., 1960). A copy is appended as Appendix A.

The opinion of the Court of Appeals is reported in 297 F.2d 692 (C.A., Ninth Circuit, 1961). A copy is appended as Appendix B.

JURISDICTION

The judgment of the Court of Appeals (R. unnumbered, Appendix C, *infra*) was entered on October 18, 1961. A Petition for a Rehearing was denied on December 4, 1961 (R. unnumbered). This Petitioner's Motion for Reconsideration of Denial of Appellant's Petition for a Rehearing and Appellant's Petition for a Rehearing en Banc was denied on December 18, 1961. (R. unnumbered). Respondent United States of America filed a Motion for Rehearing or Clarification of Opinion which was denied on January 17, 1962. (R. unnumbered).

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. When the recorded notice of a Federal Internal Revenue Tax Lien named only an individual partner (of a partnership composed of several partners doing business under a partnership name) and the lien was valid only as to the property and the rights to property of such individual, is that lien superior to the lien of a subsequent mortgage of specific partnership real property taken for value and without notice?

II. Subsidiary to the question above are the following questions:

A. In applying federal statutes imposing liens for internal revenue taxes (26 U.S.C. 6321 and 26 U.S.C. 6323; Appendix D, *infra*), does state law control the determination of what property rights, if any, a partner has in a specific partnership property?

B. Does a partner have such an interest in specific real property of a partnership that the filing of a Notice of Federal Tax Lien against such individual partner alone will impose a lien on the specific partnership

property valid against a subsequent mortgagee for value of such partnership property?

STATUTES INVOLVED

The statutes involved are set out in Appendix D *infra*.

STATEMENT OF THE CASE

Petitioner commenced this action on April 25, 1958 in the Superior Court of the State of California in and for the County of Mendocino by filing a complaint to foreclose a deed of trust upon real property situate in the County of Mendocino, State of California. (R. 7-15.) The United States of America was made a party defendant, under 28 U.S.C. 2410, for the reason that it claimed tax liens against the real property described in said deed of trust. The action was removed to the United States District Court for the Northern District of California, Southern Division, upon petition (R. 3-5) by the United States pursuant to 28 U.S.C. 1444.

The facts as stipulated to by the parties (R. 18-23) are as follows: On November 23, 1955, the District Director of Internal Revenue, San Francisco, made an assessment against "C. E. McCulloch, Jr., H. W. Bryan and M. L. Kramer, dba Little Lake Lumber Company," for Withholding and F.I.C.A. taxes. A Notice of Federal Tax Lien (Appendix E, *infra*) reflecting the amount of this assessment was filed in the Office of the County Recorder of Mendocino County, California, on January 13, 1956. This notice showed under "Name of Taxpayer" the name "Chas. E. McCulloch, et al." and under "Residence or Place of Business" the words "Little Lake Lumber Co., Box 294, Willits, Calif." Little Lake Lumber Company was at that time a partnership which held title to certain Mendocino County real property. On April 25, 1956, the partnership, for a valuable consider-

ation, made, executed and delivered to Petitioner a deed of trust on real property, which instrument secured the payment of certain promissory notes and was recorded on April 30, 1956. This instrument is the basis for the foreclosure proceedings brought by Petitioner.

Under such stipulated facts, the District Court entered a final judgment, (R. 36, 37) on November 9, 1960, holding that the tax lien of the United States was prior to the lien of Petitioner on the ground that the tax lien notice was sufficient to give constructive notice to Petitioner of the federal tax lien against the partnership (Appendix A, pp. 3, 4). Petitioner filed its notice of appeal to the United States Court of Appeals for the Ninth Circuit on November 29, 1960. (R. 38, 39) The Court of Appeals reversed the holding of the District Court and held that "the notice does not give rise to a valid lien against the interests of the unnamed partners * * *" (Appendix B, p. 12). The Court went on to hold, however, that by the filing of the notice "a valid lien was created against the interest of McCulloch in the partnership * * *" and that "such lien against such interest is prior in time and superior in right to appellant's mortgage lien." (Appendix B, p. 14). The opinion then acknowledges that this holding "may not be in accordance with usual concepts of partnership law", and follows this with the statement that "* * * we are not concerned with those concepts." (Appendix B, p. 14).

This ruling took all parties by surprise. The point was neither mentioned nor ruled upon by the District Court. It moved both parties to the appeal to seek a rehearing. The Court of Appeals cited no authority in support of the holding and we have been able to find none.

Petitioner's Petition for Rehearing was denied on December 4, 1961. (R. unnumbered.) On December 18, 1961, the

Court of Appeals denied Petitioner's Motion for Reconsideration of Denial of Appellant's Petition for a Rehearing and Appellant's Petition for a Rehearing en banc, stating in its order that "[t]he interest of McCulloch subject to the lien is his full interest in the partnership property, free and clear of other partnership indebtedness." (R. unnumbered.) On January 17, 1962 the Court of Appeals denied the motion of the United States for a rehearing or clarification of the opinion. (R. unnumbered.)

REASONS RELIED ON FOR GRANTING THE WRIT

1. The opinion of the Court of Appeals holds that "a valid lien was created against the interest of McCulloch in the partnership on January 13, 1956, the date of the filing of the notice. * * *" (Appendix B, p. 14.) This statement, taken by itself, would indicate that the Court recognized the principle that a partner does not own an undivided fractional interest in specific partnership property and therefore that the Government's tax lien would extend only to McCulloch's interest in the *partnership* or, as that term is defined in California Corporations Code Section 15026, "his share of the profits and surplus." When, however, the Court continues by saying that "such lien against such interest is prior in time and superior in right to appellant's mortgage lien." (Appendix B, p. 14), it is apparent that the Government's tax lien was not intended to be so limited. For the Government's lien to be prior to the mortgage lien it is necessary that both liens be liens on the same property. Since the mortgage lien attaches only to specific real property of the partnership, the necessary import of the Court's opinion is that the Notice of Tax Lien filed against McCulloch was held to perfect a valid tax lien against this same real property of the

partnership rather than merely against McCulloch's interest in the partnership, i.e., the profits and surplus and the assets on dissolution.

The necessary implication of the opinion of the Court of Appeals is that, contrary to the partnership law of California (California Corporations Code Sections 15024-15026, 15028(1)), the individual partner, McCulloch, owned an undivided fractional interest in the partnership real property to which the tax lien could attach. In addition, the Court's opinion must be deemed to imply that the existence of "property and rights to property", as these terms are used in 26 U.S.C. 6321, is not to be determined by application of state law, since California statutory and case law have uniformly held that a partner has no undivided fractional interest in partnership property, *Hatch's Estate v. Commissioner of Internal Revenue*, 198 F.2d 26, 29 (C.A., Ninth Circuit, 1952); *Clarke v. Fiedler*, 113 P.2d 275, 281 (Cal., 1941).

The decision of the court below is directly in conflict with the decision of the United States Supreme Court in the case of *United States, et al. v. Kaufman, et al.*, 267 U.S. 408, 45 Sup. Ct. 322 (1925); as well as with the decision of the Court of Appeals, Sixth Circuit, in *United States v. Worlen, et al.*, 213 F.2d 509, 512 (1954), and the decision of the Circuit Court of Appeals, Tenth Circuit, in *Adler, et al. v. Nicholas*, 166 F.2d 674, 678 (1948). In *United States, et al. v. Kaufman, et al., supra*, 413, the Court approves the rule that the partner's "interest in the partnership property was his share in the surplus after the partnership debts were paid, and that such surplus only was liable for his separate debts" and, on page 414, holds that "the United States is not entitled to any priority of payment out of such [partnership] assets for a tax due it from an individual

partner, except to the extent of the share of such partner, if any, in the surplus remaining after the payment of the partnership debts." The cases of *United States v. Worley, et al., supra*, and *Adler v. Nicholas, supra*, likewise conclude that a partner has no property right, existing as an undivided fractional interest, in the partnership property, but that his only property right is his share of the surplus after all partnership debts have been paid, and that only this latter interest is subject to the debts of the individual partner. The court below attempts to distinguish *United States v. Worley, et al., supra*, on the ground that it involves liability for personal income tax rather than, as in the instant case, liability for taxes assessed against the partnership. This distinction, however, is illusory and not relevant to the issue involved in the instant case. In the instant case, regardless of the origin of the tax liability, the Notice of Tax Lien purported to be notice only of a tax debt due by an individual and gave no notice of a tax debt due by the partnership. The Notice of Tax Lien gave notice of and, therefore, under 26 U.S.C., 6321, 6323, made valid only a tax lien against the property and property rights of the named taxpayer, Chas. E. McCulloch. The distinction made by the Court of Appeals might be relevant were the question here involved one concerning the identity of the person owing the tax. It is not relevant when the question is merely whether the notice filed against an individual partner was sufficient to perfect a tax lien on partnership assets which is valid as against subsequent mortgagees of the same assets. The crucial question, then, was not who owed the tax, but whether the "property and rights to property" of Chas. E. McCulloch included an undivided fractional interest in the partnership property. The Court of Appeals answers this question by holding that the lien of the Government on specific partnership real property is

superior to Petitioner's mortgage lien on the same property and in the process expressly disregards the usual concepts of partnership law and necessarily implies that the partner against whom the lien was filed has an undivided fractional interest in the partnership real property which is subject to his individual debts. In view of these considerations, it is submitted that the distinction drawn by the court below is in fact no distinction at all in regard to the question involved in the instant case and that the opinion of the court below is in direct conflict with the three cases cited above.

Because of the principles upon which the opinion of the court below must rest, there is a conflict in principle between this opinion and the decisions of the United States Supreme Court in *United States of America v. Bess*, 357 U.S. 51, 78 Sup. Ct. 1054 (1958) and of the Courts of Appeal in three other circuits. In *United States v. Bess*, involving the question of what interest a taxpayer had in certain life insurance policies, the Court says, at page 55, that "[s]ince Section 3670 [now 26 U.S.C. 6321] creates no property rights but merely attaches consequences, federally defined, to rights created under state law [citation of cases], we must look first to Mr. Bess' right in the policies as defined by state law." This case is cited with approval and the same principle applied in *Central Surety & Insurance Corp. v. Martin Infante Co.*, 272 F.2d 231 (C.A., Third Circuit, 1959). To the same effect is *Fidelity & Deposit Co. v. New York City Housing Auth.*, 241 F.2d 142, 144 (C.A., Second Circuit, 1957), where the Court says that, in adopting Section 3670 (now 26 U.S.C. 6321), "Congress did not create property interests on which a lien might be imposed; there is no suggestion that it authorized the federal courts to do so" and that, while classification of such interests is a Federal question, "the existence of the interest to be federally classified, however, is solely a question of state law." These three

cases recognize and rely on the principle that state law governs in determining whether a taxpayer has "property" or "rights to property" which are subject to a tax lien under 26 U.S.C. 6321. An illustration of the application of partnership law concepts to the determination of a question of the property rights of a taxpayer is found in *Berry v. United States*, 267 F.2d 298, 300 (C.A., Sixth Circuit, 1959), where the court says that it is settled law "that the joint assets of a partnership belong to the firm and not the partners; that a partner has no individual property in any specific assets of the firm; that the interest of each partner in the partnership property is his share of the surplus, after the partnership debts are paid and after the partnership accounts are settled * * *" This principle is necessarily in conflict with the opinion of the court below in holding that the United States, by filing a Notice of Tax Lien against McCulloch, perfected a tax lien against specific partnership property which was prior to Petitioner's mortgage lien.

Clearly, the question presented is one of substantial importance to all persons who engage in any type of business transactions with partnerships. The law permits real property to be held in the partnership name without disclosure of the names of all or any of the partners. There is presently a trend toward use of partnership ownership in the large land development projects that are taking place throughout the country which makes the question involved in this case even more important than formerly. Financing for tract developments and office and apartment building construction will be seriously hampered if banks, savings and loan associations, insurance companies and other lending institutions are unable to determine, by a search of the records in the partnership name, the priority of their security instruments. If the filing of a notice of a federal tax lien against an individual perfects a valid lien as against third parties upon some fractional portion of the property

of any partnership in which the licnee may happen to be a partner, not only would the security of mortgagees and other lien holders be substantially impaired, but property purchased from a partnership would be encumbered by such secret tax liens without notice to the purchaser and general creditors who advance credit on the faith of the apparent net worth of the partnership would find this net worth diminished by a lien of which they had no notice. Conversely, as a result of the hazard involved in making loans or advancing credit to partnerships, a partnership would experience difficulty in arranging for loans or in carrying on any business transaction in which the credit of the partnership was involved. Section 6323 of the U.S.C. was enacted to abrogate the harsh results of the rule announced in the case of *United States v. Snyder*, 149 U.S. 210, 13 Sup. Ct. 846 (1893), which held that federal tax liens were valid against bona fide purchasers and mortgagees for value without notice. The opinion of the court below would in a measure defeat the purpose of this legislation.

Under the Uniform Partnership Act, as enacted in a majority of the states, including California, a partner does not have a divisible or assignable interest in specific partnership property (California Corporations Code Section 15025(2)(b)); his only property interest is his interest in the profits and surplus and in the assets upon dissolution (California Corporations Code Section 15026. While the partnership continues, the debts of an individual partner may not be collected from specific partnership assets, but may be collected only out of the partner's interest in profits and surplus. *Sherwood v. Jackson*, 8 P.2d 913, 914 (Cal., 1932); California Corporations Code Section 15028(1). The holding of the court below cannot be reconciled with these established concepts of partnership law. It is therefore

important that the cloud which the opinion below casts on these principles of partnership law be dispelled. It is important that the members of partnerships now in existence, as well as persons who contemplate forming partnerships in the future, are able with certainty to know their rights and liabilities in regard to the specific assets of the partnership.

Finally, the opinion below furnishes only confusion rather than guidance to litigants and trial courts alike. The opinion indicates that the Court is not concerned with usual concepts of partnership law. Does this, in the face of contrary rules in other circuits, mean that the Ninth Circuit will not in any case apply partnership concepts when faced with a question of what property or property rights a partner has in a partnership and its assets? If not, in what circumstances will the Ninth Circuit look to partnership law concepts and in what circumstances will these concepts be ignored?

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(Appendices Follow)

Appendix A

United States District Court, N. D. California, S. D.
July 12, 1960.

No. 37260.

F. P. Bausch, Inc., a California corporation, Plaintiff,

v.

Little Lake Lumber Company, also known as Little Lake Lumber Co., a partnership, et al., Defendants.

Oliver J. Carter, District Judge.

The action is one of foreclosure by F. P. Bausch, Inc., which was originally instituted in the Superior Court of the State of California, in and for the County of Mendocino. The United States of America was named a party defendant pursuant to 28 U.S.C.A. § 2410, and the action was removed to this Court under authority of § 1444 of Title 28 upon petition by the United States of America.

The cause is before the Court upon a stipulation of facts which reduces the questions of law to two; namely, whether or not a tax lien filed by the United States was sufficient to impart notice against plaintiff, F. P. Bausch, Inc., as a subsequent mortgagee of Little Lake Lumber Company, so as to create a priority in favor of the United States against the plaintiff, and; secondly, whether or not payments made by Little Lake Lumber Company were erroneously credited by the United States to a junior tax lien instead the United States was under a duty to credit such payments to the senior tax lien.

On November 23, 1955, the Director made an assessment against Little Lake Lumber Company, a partnership, con-

1 Statement taken from the Memorandum of Points and Authorities for the United States.

sisting of C. E. McCulloch, Jr., H. W. Bryan and M. L. Kramer for withholding and FICA taxes for the third quarter of 1955.[2] The Director, on January 13, 1956, filed a tax lien with the County Recorder of Mendocino County, California, as provided by § 27330 of the Government Code of California.

Plaintiff, F. P. Baugh, Inc., made a loan to Little Lake Lumber Co. on April 25, 1956, secured by a deed of trust and chattel mortgage which were recorded April 30, 1956. Plaintiff contends that the United States failed to file a tax lien against Little Lake Lumber Co. sufficient to perfect said lien in favor of the United States.

Pursuant to § 6321 of the Internal Revenue Code, 1954,[3] the United States is given a lien "upon all property and rights to property, whether real or personal." The scope of this section is limited by § 6323 of the Internal Revenue Code in that, "the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate."[4]

In filing the notice of tax lien, the director used the standard printed form for such notices used by the United States, but plaintiff urges that the form was improperly filled in and was, hence, insufficient to impart notice. The defect urged is that on the line designated "Name of Taxpayer" the name of Little Lake Lumber Co. did not appear. This line contained the following, "Chas. E. McCulloch et al" and immediately below this line which is designated "Residence or Place of Business" appeared the following, "Little Lake Lumber Co. Box 271 Willits, Calif."

2. Stipulation of facts, paragraph 6.
3. 26 U.S.C.A. § 6321.
4. 26 U.S.C.A. § 6323.

The filing of the notice of tax lien is required to perfect the right of the United States against those creditors enumerated in §6323. The reason Congress requires the Director to file notice of tax liens in a public office is to give persons dealing with delinquent taxpayers an opportunity to ascertain the existence of such liens so as to avoid any harshness resulting from secret liens.[5] The sufficiency of the contents of the notice of tax lien filed to carry out its avowed purpose is a question to be determined by federal law.[6]

The notice in question herein actually contained the name of Little Lake Lumber Co. and except for the designation of the line where the partnership named appeared as one of address no contention could be made that the notice was insufficient. The County Recorder in indexing this notice of tax lien indexed it under the name of Chas. E. McCulloch as well as under the name Little Lake Lumber Co. and therefore a search of the records would have disclosed the lien.

A recorded document not only imparts constructive notice of its own contents but also "such other facts as those concerned with it would have learned from the record, if it had been examined, and inquiries suggested by it, duly prosecuted, would have disclosed."[7] On discovery of the notice of tax lien filed January 13, 1956, any doubt existing in the mind of the searcher as to the scope of the lien should have been resolved by further inquiry. Such inquiry

5. Richter's Loan Co. v. United States, 5 Cir., 235 F.2d 753.

6. 26 U.S.C.A. §6323 b; United States v. Rasmusson, 8 Cir., 253 F.2d 944, 946.

7. Sapp v. Warner, 105 Fla. 245, 141 So. 424, 143 So. 648, quoted without specific adoption in Richter's Loan Co. v. United States, 5 Cir., 235 F.2d 753; 45 Am.Jur. 490; Leonard v. Osburn, 169 Cal. 157, 146 P. 530.

in this case reasonably pursued would have disclosed that the lien filed of record did include C. E. McCulloch, Jr., a general partner in Little Lake Lumber Co., as well as Little Lake Lumber Co. as named taxpayer.

It is therefore concluded that the notice of tax lien filed by the Director was sufficient to perfect the right of the United States pursuant to § 6323 of the Internal Revenue Code.

The Director filed a second notice of tax lien January 25, 1957, which is clearly junior to the plaintiff as a secured creditor dating from April, 1956. Plaintiff contends that payments made by Little Lake Lumber Co. during 1957 should have all been credited to the January, 1956 tax lien. The Director had credited seven such payments to the junior lien. The United States concedes that the payments made on September 24, 1957, and October 9, 1957, should have been credited to the senior tax lien filed January 13, 1956.

Little Lake Lumber Company by accompanying letter directed that payments made on September 24, 1957 and October 9, 1957 be credited to the lien filed January 13, 1956. The cases are clear that a debtor may direct to which debt a credit may be entered where more than one debt is due.[8] Therefore the entry by the Director of the two credits of September 24, 1957 and October 9, 1957 amounting to $1,400 must be reallocated to the senior lien of January 13, 1956.

The two letters directing payment to the senior lien made no indication as to future payments. The direction was made after three other payments had been credited to the junior lien. No course of conduct was established raising an

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8. Lehigh & Hudson River Ry. Co. v. Commissioner of Internal Revenue, 2 Cir., 36 F.2d 719; United States v. Kirkpatrick, 9 Wheat. 720, 6 L.Ed. 199; Jones v. United States, 7 How. 681, 12 L.Ed. 870.

inference as to future payments and, hence, the general rule is applicable that where a debtor fails to direct the payment to a specific debt the creditor may do so.[9] The Director having made an election it is binding.

The Government is awarded judgment in conformity with the relative priorities established by this opinion. Counsel for the Government is directed to prepare and present findings, conclusions and a judgment in accordance herewith.

[9] In re Ciabattari, D.C., 29 F.Supp. 373; Wolf v. Aero Factors Corp., D.C., 126 F.Supp. 872; National Bank of Commonwealth of New York City v. Mechanic's Nat. Bank, 94 U.S. 437, 24 L.Ed. 176; Jones v. United States, 7 How. 681

Appendix B

United States Court of Appeals for the Ninth Circuit

No. 17,230—Oct. 18, 1961

F. P. Baugh, Inc., a California corporation,

Appellant,

vs.

Little Lake Lumber Company, aka Little Lake Lumber Co., a partnership; United States of America, et al.,

Appellees.

Appeal from the Judgment of the United States District Court for the Northern District of California

OPINION

Before: Chambers and Merrill, Circuit Judges, and Kilkenny, District Judge

Kilkenny, District Judge:

Appellant seeks to foreclose a chattel mortgage and deed of trust on certain property in California. The United States of America, respondent here, filed a counterclaim for foreclosure of an alleged tax lien. The lower court found for respondent and held that the notice of tax lien was sufficient to place a reasonable prudent person on inquiry and that if inquiry had been made, the person so inquiring would be inevitably led to the conclusion that the Government was claiming a lien on the property of all of the parties doing business as Little Lake Lumber Company and on the property of the partnership itself.

On the 23rd day of November, 1955, an assessment for Withholding[1] and F.I.C.A.[2] taxes was made by the respondent against C. E. McCulloch, Jr., H. W. Bryan and M. J. Kramer, dba Little Lake Lumber Company.

On January 13, 1956, the District Director of Internal Revenue caused a form designated "NOTICE OF FEDERAL TAX LIEN UNDER INTERNAL REVENUE LAWS" to be filed with the County Recorder of Mendocino County, California. On said date this instrument was indexed in the general index - grantors, defendants, etc., to Charles E. McCulloch and on another page of the index to Little Lake Lumber Company. Said notice read, in part, as follows:

> "Pursuant to the provisions of Sections 6321, 6322 and 6323 of the Internal Revenue Code of 1954, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the *following-named taxpayer*, taxes (including interest and penalties) which after demand, for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is a *lien in favor of the United States upon all property and rights to property* belonging to *said taxpayer*, to-wit:
>
> NAME OF TAXPAYER:
> Chas. E. McCulloch et al
>
> RESIDENCE OR PLACE OF BUSINESS
> Little Lake Lumber Co. Box 271 Willits Calif.
>
> (Emphasis added)

1. 26 U.S.C. 3401, et seq.
2. 26 U.S.C. 3101, et seq. Federal Insurance Contributions Act.

Little Lake Lumber Company is a partnership organized under the laws of the state of California. The title to the property was in the name of said partnership. After said filing and on April 25, 1956, the partnership, for a valuable consideration, made, executed and delivered to appellant a chattel mortgage and deed of trust, which instruments secured the payment of certain promissory notes. These instruments are the basis of the foreclosure proceedings.

After proper assessment the United States has a lien upon all property and *rights* to property, whether real or personal, belonging to any person liable to pay the tax.[3] However, with certain exceptions not here applicable, this lien has no validity against a mortgagee until a proper notice has been filed.[4]

3. 26 U.S.C. 6321. Lien for taxes.

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

4. 26 U.S.C. 6323. Validity against mortgagees, pledgees, purchasers, and judgment creditors.

"(a) Invalidity of lien without notice. Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under state or territorial laws. In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) With clerk of district court. In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notices; or

(3) With clerk of district court for District of Columbia. In the office of the clerk of the United States District Court

It is conceded that the California Recording Statutes meet the requirements of the Federal legislation. For that matter, the filing of the alleged notice by the District Director recognizes the conformity of the California legislation on the subject. Therefore the only matter we have for determination is the sufficiency of the notice of lien and the effect, if any, of the alleged constructive notice of the lien. Federal law determines the priority of competing liens asserted against the taxpayer's "property" or "rights of property." *United States v. Vorreiter*, 355 U.S. 15; *United States v. White Bear Brewing Co.*, 350 U.S. 1010; *Aquilino v. United States*, 363 U.S. 509.

Acting under the authority granted by Congress[6] the Commissioner of Internal Revenue promulgated a regula

for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

"(b) Form of notice. If the notice filed pursuant to subsection (a)(1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a)(2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien."

5. California Government Code:

Sec. 27330. Liens for Federal Taxes.

"Notices of liens for internal revenue taxes payable to the United States and certificates discharging such liens may be filed in the office of the county recorder of the county within which the property subject to the lien is situated."

Sec. 27331. Federal Tax Liens; Manner of Indexing.

"When a notice of the tax lien is filed, the recorder shall forthwith enter it in an alphabetical federal lien tax index provided by the board of supervisors, showing on one line the name and residence of the taxpayer named in the notice, the collector's serial number of the notice, the date and hour of filing, and the amount of tax and penalty assessed. He shall file and keep all original notices so filed in numerical order and in a file provided by the board of supervisors and designated federal tax lien notices."

6. 26 U.S.C. 7805(a), (e).

tion, effective December 30, 1954, which included a form of notice of lien as follows:

§ 301.6323-1

"(3) Form of notice. The form to be used for filing the notice of lien shall be Form 668, 'Notice of Federal Tax Lien Under Internal Revenue Laws.' Such notice, filed in the office designated by the law of a State or Territory, shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien. For example, the omission from the notice of lien of a description of the property subject to the lien will not affect the validity thereof, even though the law of the State or Territory requires that the notice of lien contain a description of the property subject to the lien.

* * * * * * *"

The form of notice used in this case was printed by the Government Printing Office in January, 1955, is designated Form No. 668, and is obviously the form referred to by the Commissioner in the above regulation.

It is clear that the Commissioner interpreted the legislation as requiring him to provide a form which would disclose the names of the taxpayers with reasonable preciseness. The contemporaneous construction of a statute by those charged with its administration is entitled to great weight. *C.I.R. v. South Texas Lumber Company*, 333 U.S. 496; *United States v. Leslie Salt Co.*, 350 U.S. 383; *Grace Line Co. v. Granquist*, 9 Cir., 1956, 237 F. 2d 290, cert. den. 353 U.S. 911.

We feel that the requirement of the Commissioner, under the approved form, that the taxpayers should be named is wholesome and salutary and fully within the spirit of the

legislation which requires the filing of a notice of the lien. The Commissioner, having drafted the form which required the naming of the taxpayer against whom the lien is claimed, should not ask the Court to place in the notice the names of persons whom his draftsman attempted to include by the insertion of the abbreviation of the Latin "et alius" or "et alii." The abbreviation "et al" encompasses both singular and plural and commonly means "and another" or "and others." Black's Law Dictionary, p. 652; *Crittendon v. Rogers*, 278 Ky. 481, 128 S.W. 2d 942, 943; *LeBlanc v. Babin*, 197 La. 825, 2 So. 2d 225, 229.

Prior to 1913, Federal tax liens were valid against bona fide purchasers and mortgagees for value without notice. *United States v. Snyder*, 149 U.S. 210. In 1913[3] Congress enacted what might be termed the parent of 26 U.S.C. 6323, "to meet the harsh condition created" by the holding in the Snyder case. *United States v. Gilbert Associates, Inc.*, 345 U.S. 361.

The Congress gave full and complete power to the Commissioner to make and enforce the rules and regulations under which the United States may assert its tax liens against those who may be financing the commercial enterprises which are the life blood of the nation's economic strength. To require the Commissioner to abide by the rules which he obviously felt were required to protect such strength is nothing more than good common sense.

The statute directs that the lien shall not be *valid* unless a notice is filed pursuant to the statute. "Valid" has a well understood technical meaning, as well as a popular acceptation, and must receive such meaning in the Courts if its use in the statute does not suggest a different one. The

[3] 37 Statutes at Large 1016

word means good or sufficient in point of law; sustainable and effective in law. *United States v. McCutchin*, 234 F. 702, 709; *Sharpleigh v. Surdam*, 21 Fed. Cas. 1173, 1178. The character, operation and extent of the lien must be ascertained by the terms of the statute which creates and defines it. The lien should only extend to persons or conditions provided for by the statute and the regulations, and then only where there has been a substantial compliance with all such requirements. *United States v. Beaver Run Coal Co.*, 3 Cir., 1938, 99 F. 2d 610. We hold that the notice was insufficient to perfect the lien against the appellant as to the interests of the partners H. W. Ryan and M. L. Kramer in the partnership property.

The decision of the lower court upholding the validity of the lien was based on the lower court's finding that the notice was sufficient to place the appellant on inquiry and that an inquiry would have disclosed that "et al" was intended to cover the remaining partners, doing business as Little Lake Lumber Company. There is no claim that appellant had actual notice of the alleged lien.

A large segment of the brief of each party is devoted to constructive notice, implied actual notice and inquiry notice. We believe constructive notice includes the other two, and that the factual background in the present case does not suggest an application of the rule. The fact that Little Lake Lumber Company may have been mentioned as part of the address of the taxpayer is of no significance, nor is the fact that the County Recorder concluded it was proper to index the address, as well as the name, of the taxpayer.

In any event, the notice does not give rise to a valid lien against the interests of the unnamed partners, even though the evidence discloses actual knowledge on the part of the mortgagee. We must keep in mind that we are dealing with

the validity or invalidity of the lien insofar as the unnamed taxpayers are concerned. It requires no citation of authority to state that statutes *in pari materia* must be construed together. 26 U.S.C. 6321 and 6323 concern themselves with the same subject matter, i.e., the lien of federal taxes and when such lien is valid against a mortgagee and others. We are passing on the validity of the lien, rather than notice of the tax assessments, either actual or constructive. This view finds wholehearted support in *United States v. Beaver Run Coal Co.*, supra. In that case the United States contended that its lien was entitled to priority over the mortgage on the ground that at the time the loan was negotiated and the mortgage executed the mortgagee knew that the Coal Company owed the taxes in question. That case arose at a time when the lien statute required the filing of the notice with the Clerk of the District Court. A proper notice was filed, but was filed in the wrong district. The mortgagee knew of the existence of the tax assessment.

In answer to the contention that the Court should breathe life into the allowed lien by reason of the fact that the mortgagee had actual notice of the tax, the Court said that the statute dealing with the validity of the lien as against a mortgagee was clear and that the Court should not rewrite the statute and read into it restrictions and limitations which were not there. We observe that the Beaver Run case was decided in 1938 and that no Congressional action has ever been taken to modify or change the effect of such decision.

At the time of the arguments, counsel for appellants conceded that the notice was probably good as to the taxpayer C. E. McCulloch, Jr. and that the slight difference between "C. E. McCulloch, Jr." in the assessment and "Chas. E. McCulloch" in the notice was of no consequence. The taxes

in question. Withholding and F.I.C.A. were statutory obligations of the partnership and the partners, 26 U.S.C. 3403; 26 U.S.C. 3201 (a), (e). This distinguishes our problem from *United States v. Woiler*, 6 Cir., 1954, 213 F. 2d 569, in which the basis of the tax lien was personal income taxes. The statute[s] is very specific, as applied to McCulloch. It creates a lien upon all his property and *all his rights to property*. These being partnership debts and the debts of the individual partners, a valid lien was created against the interest of McCulloch in the partnership on January 13, 1956, the date of the filing of the notice, and such lien against such interest is prior in time and superior in right to appellant's mortgage lien. The United States has no lien, under the notice in question, against the interests of the remaining partners. Holding that the lien is valid on the partnership interest of McCulloch may not be in accordance with usual concepts of partnership law. However, we are not concerned with those concepts. Rather, we are construing federal statutes confined to the unusual and highly technical field of tax law. We cannot, under the clear language of the statute, permit the interest of McCulloch to escape."

The decree of the lower court is vacated and the cause remanded to the District Court to determine the interest of McCulloch in the partnership property and then enter a decree of foreclosure in accordance with the views herein recorded.

AFFIRMED IN PART; REVERSED IN PART.

ORDER DENYING PETITION FOR RECONSIDERATION.

The petition for reconsideration is denied.

The interest of McCulloch subject to the lien is his full interest in the partnership property free and clear of other partnership indebtedness.

[s] 26 U.S.C. 6321.

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 17230

F. P. Bacigalupi, Inc.,
Appellant,
vs.
Little Lake Lumber Company, aka Little Lake Lumber Co., and United States of America,
Appellees.

Appeal from the United States District Court for the Northern District of California, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is vacated, and that this cause be, and hereby is remanded to the said District Court to determine the interest of McCulloch in the partnership property and enter a decree of foreclosure in accordance with the views expressed in opinion of this court.

Filed and Entered: Oct. 18, 1961.

Appendix D

Internal Revenue Code of 1954:

26 U.S.C. § 6321. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6323. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors:

(a) Invalidity of lien without notice. Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate

(1) Under state or territorial laws. In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) With clerk of district court. In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) With clerk of district court for District of Columbia. In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) Form of notice. If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

California Corporations Code:

§ 15024. Property rights. The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

§ 15025. Ownership of specific partnership property.

(1) Co-owner; tenancy in partnership. A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) Incidents of tenancy. The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin, and is not community property.

§ 15026. Interest in partnership. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

§ 15028. Creditor's remedy to reach partner's interest in partnership.

(1) Application by judgment creditor; charge on partner's interest; appointment of receiver. On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts, and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) • • •

(3) • • •

Form 668
REV. JAN. 1955

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

NOTICE OF FEDERAL TAX LIEN UNDER INTERNAL REVENUE LAWS

DISTRICT: SAN FRANCISCO

NO. 8 6 75

Pursuant to the provisions of Sections 6321, 6322, and 6323 of the Internal Revenue Code of 1954, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

NAME OF TAXPAYER

CHAS F MCCULLOCH ET AL

RESIDENCE OR PLACE OF BUSINESS

LITTLE LAKE LUMBER CO BOX 270 WILLITS CALIF

NATURE OF TAX	ACCOUNT NO.	YEAR OR TAXABLE PERIOD	ASSESSMENT DATE	AMOUNT OF ASSESSMENT
				$
~~WT FICA~~	~~11 55 23 29021S~~	~~3 55~~	~~11 23 55~~	~~304.25~~
WT FICA	11 55 23 50715	9 55	11 23 55	18,255.09

PLUS STATUTORY INTEREST FROM ~~DUE DATE OF RETURN~~ TO DATE OF PAYMENT

(Mendocino)

TOTAL $18,559.34

WITNESS my hand at Santa Rosa, California, on this,

the 11th day of January, 1956

DISTRICT DIRECTOR OF INTERNAL REVENUE	BY (Signature)	TITLE
Harold Hawkins	Julian J. Butler	Acting Group Supervisor

(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien. G.C.M. 26419, C.B. 1954-1, 125.)

U. S. GOVERNMENT PRINTING OFFICE 16-0 [illegible]

Appendix E
Notice of Federal Tax Lien Under Internal Revenue Laws—
Form 668

Appendix E

Notice of Federal Tax Lien Under Internal Revenue Laws—Form 668.

(Attached hereto)

INDEXED

No. 11007

UNITED STATES

vs.

NOTICE OF TAX LIEN

Filed this _____ day of

_____, 19____, at _____ m.

_____

Clerk (or Registrar).

FORM 668 (REV. 1-55)

FILED

JAN 13 1956 - 8 32 A.M.

ALTA BALLOU, Recorder

By _____ Deputy

Fed. Tax Lien 2

INTERNAL REVENUE CODE OF 1954

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) INVALIDITY OF LIEN WITHOUT NOTICE.—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under State or Territorial Laws.—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) With Clerk of District Court.—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) With Clerk of District Court for District of Columbia.—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) FORM OF NOTICE.—If the notice filed pursuant to subsection (a)(1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a)(2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) EXCEPTION IN CASE OF SECURITIES.—

(1) Exception.—Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) Definition of Security.—As used in this subsection, the term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(d) DISCLOSURE OF AMOUNT OF OUTSTANDING LIEN.—If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed.

SEC. 6325. RELEASE OF LIEN OR PARTIAL DISCHARGE OF PROPERTY.

(a) RELEASE OF LIEN.—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—

(1) Liability Satisfied or Unenforceable.—The Secretary or his delegate finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied, has become legally unenforceable, or, in the case of the estate tax imposed by chapter 11 or the gift tax imposed by chapter 12, has been fully satisfied or provided for; or

(2) Bond Accepted.—There is furnished to the Secretary or his delegate and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements, relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such rules or regulations.